

**UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC**

In the Matter of:

AMERICAN AIRLINES, INC.

FAA Order No. 1999-1¹

Served: March 2, 1999

Docket Nos.: CP95SW0195, CP95SW0196,
CP95SW0197, CP95SW0199, CP95SW0200,
CP95SW0201, CP95SW0202, CP95SW0207,
CP95SW0208, CP95SW0209, CP95SW0210,
CP95SW0211, CP95SW0212, CP95SW0213,
CP95SW0215, CP95SW0216, CP95SW0217,
CP95SW0294, CP95SW0295, CP96SW0132,
CP96SW0133, CP96SW0134, CP96SW0170

DECISION AND ORDER²

American Airlines (American) has filed a consolidated appeal of the written initial decisions³ issued by Administrative Law Judge Ronnie A. Yoder in 23 related security cases. Each case involves the failure of American employees or contractors to display their identification badges in the "Security Identification Display Area" of Dallas/Forth Worth International Airport.⁴ This decision denies American's appeal and affirms each of the law judge's decisions.

¹ Portions of this order have been redacted for security reasons under 14 C.F.R. Part 191.

² The Administrator's civil penalty decisions are available on LEXIS, WestLaw, and other computer databases. They are also available on CD-ROM through Aeroflight Publications. Finally, they can be found in Hawkins's Civil Penalty Cases Digest Service and Clark Boardman Callaghan's Federal Aviation Decisions. For additional information, see 63 Fed. Reg. 57,729, 57,743 (October 29, 1998).

³ A copy of one representative decision (CP95SW0195) is attached.

⁴ American allegedly committed 51 violations at Dallas/Fort Worth Airport between August 9, 1994, and February 11, 1996.

In each case, Complainant Federal Aviation Administration (FAA) alleges that American violated 14 C.F.R. § 108.5(a), which requires air carriers like American to adopt and carry out a security program⁵ that “provide[s] for the safety of persons and property traveling in air transportation ... against acts of criminal violence and air piracy.”⁶ Specifically, Complainant alleges that American violated Section 108.5(a) by failing to carry out Section VI.B.1 of the Air Carrier Standard Security Program (security program).⁷ Thus, Section VI.B.1 is at the heart of this appeal. It provides as follows:

* * *

(Emphasis added.)

At a prehearing conference, American said it intended to show that the proposed civil penalties were inconsistent with those assessed in other cases and that Complainant was wrong to seek progressively higher penalties as the violations continued. American also said it would show that it enforced the badge requirements independently of the FAA. The law judge directed the parties to file prehearing briefs outlining their anticipated factual presentations and any basis for lowering the proposed sanctions. (Prehearing Conference, October 15, 1997, Tr. 53, 60.)

⁵ 14 C.F.R. § 108.5(a)(1) provides as follows:

§ 108.5 Security Program: Adoption and implementation.

(a) Each certificate holder shall adopt and carry out a security program that meets the requirements of § 108.7 for each of the following scheduled or public charter passenger operations:

(1) Each operation with an airplane having a passenger seating configuration of more than 60 seats.

⁶ 14 C.F.R. § 108.7(a)(1).

⁷ American adopted the Air Carrier Standard Security Program.

In its prehearing brief, American failed to address the sanction issue, despite the law judge's order. American simply argued that it committed no violations, given its interpretation of the regulation and security program. Specifically, American argued that the term * * * in Section VI.B.1 did not require employees to display the badges continuously but only required the employee to present the badge on demand. American announced its intention to present evidence at the hearing that the badges were on the employee's person in each case, even if they were not on the outermost garment. According to American, the following scenario was typical: because of the weather or the type of work required in the belly of an aircraft, the American employee would place his or her badge in a shirt pocket, a pants pocket, or under an outer jacket. (Prehearing Brief at 2.) American also argued, in the alternative, that Section VI.B.1 was void for vagueness.

Complainant then moved for a decision, arguing that a hearing was unnecessary because the material facts were undisputed. According to Complainant, the only issue was a purely legal one involving the proper interpretation of Section VI.B.1.

American filed a document opposing Complainant's motion for decision, arguing that the law judge should not make any factual findings without holding a hearing. American also filed its own motion for decision, arguing that there can be no violation of 14 C.F.R. § 108.5(a) without a showing that air carrier personnel worked on a specific flight. American pointed out that Complainant failed to allege, and could not prove, that its employees were working on specific flights. According to American, in many cases the employees were inside the Security Identification Display Area (*e.g.*, in a bag room), but were not working on a particular flight.

The law judge issued a separate order in each case. Each order granted Complainant's motion for decision on the ground that American had demonstrated no factual issues requiring a hearing.

The law judge rejected American's argument that * * * means that the badge need not be displayed as long as it can be presented on demand. He pointed out that American had admitted, in effect, that the badges could not be observed by casual observation. The law judge also rejected American's claims that the regulation was unconstitutionally vague and that each violation must relate to a particular flight.

As for the sanctions, the law judge pointed out that although American said it could provide information that would support lowering the penalties, it violated his prehearing order by failing to include such information in its brief, warranting an adverse inference. The law judge stated that American had waived its right to contest the proposed civil penalty levels, which, at \$3,500 - \$6,000 per violation, were consistent with the Sanction Guidance Table in FAA Order No. 2150.3A, Appendix 4, p. 7.⁸ On appeal, American renews several arguments it raised unsuccessfully before the law judge.

⁸ The docket numbers, violation dates, amount per violation, number of violations, and total amount assessed by the law judge per docket are as follows:

CP95SW0195	8/9/94	\$3,500	(1)	\$3,500	CP95SW0213	10/28/94	\$5,500	(1)	\$5,500
CP95SW0196	8/9/94	\$3,500	(1)	\$3,500	CP95SW0215	11/4/94	\$6,000	(2)	\$12,000
CP95SW0197	8/10/94	\$3,770	(13)	\$49,000*	CP95SW0217	12/5/94	\$6,000	(3)	\$18,000
CP95SW0199	8/24/94	\$4,000	(2)	\$8,000	CP95SW0212	12/9/94	\$6,000	(2)	\$12,000
CP95SW0200	8/31/94	\$4,000	(1)	\$4,000	CP95SW0216	12/16/94	\$6,000	(3)	\$18,000
CP95SW0201	8/31/94	\$4,170	(3)	\$12,500*	CP95SW0294	1/31/95	\$6,000	(1)	\$6,000
CP95SW0202	9/8/94	\$4,500	(1)	\$4,500	CP95SW0295	1/31/95	\$6,000	(1)	\$6,000
CP95SW0208	9/15/94	\$5,000	(2)	\$10,000	CP95SW0132	9/15/95	\$6,000	(1)	\$6,000
CP95SW0209	9/23/94	\$5,000	(1)	\$5,000	CP95SW0133	9/18/95	\$6,000	(2)	\$12,000
CP95SW0210	10/5/94	\$5,000	(2)	\$10,000	CP95SW0134	9/20/95	\$6,000	(1)	\$6,000
CP95SW0207	10/13/94	\$5,500	(1)	\$5,500	CP95SW0170	2/11/96	\$6,000	(1)	\$6,000
CP95SW0211	10/26/94	\$5,500	(5)	\$27,500	TOTAL			(51)	\$250,500

*Includes rounding.

Under the security program, were the employees' badges * * * when they were hidden inside a shirt or pants pocket or under an outer garment?

This is the first case to address the proper interpretation of the term * * * in the security program. American argues that the term * * * means only that airline employees must present their badges on demand, not that they must display their badges. According to American, if the FAA had intended continuous display, then it would not have added the term * * * to * * *. American also claims that continuous display is unsafe, because its employees must work in small spaces where their badges could get caught in aircraft parts.

As the law judge pointed out, badges can be designed in ways that do not cause safety problems. (Initial Decision at 6.) Indeed, when the FAA added the * * * language to the security program, it stated that "options such as arm band display cases or clip-on attachments allow air carrier employees and contractors to comply with [the badge display requirement] without compromising safety." (Analysis of Comments, Air Carrier Standard Security Program, Change 38, p. 17, included as Exhibit 2 to FAA's Reply to Prehearing Brief/Motion for Decision.)

It would violate common sense to hold that * * * means hidden from view. The term * * * is an expression that means "in plain sight." The word * * * intensifies * * *. It does not weaken it. If the agency intended to permit the badges to be hidden, the agency would not have used the term * * *. Instead, it would have stated something like "all employees must carry identification on their persons" or "all employees must present identification on request."

As the law judge pointed out:

- Continuous display is consistent with the security program's purpose to allow security personnel to identify unauthorized persons as quickly as possible and to prevent them from being in a position to endanger air transportation.
- The term * * * does serve a purpose because badges would not be visible to security personnel from every vantage point unless an employee displayed a badge on each side of his or her body.
- The * * * language in Section VI.B.1 of the security program (as in * * *) would be meaningless if employees were only required to produce identification quickly on demand.

Moreover, American knew or should have known that when the FAA used the term * * *, it intended continuous display. Before the agency added the words * * * to the security program, the FAA notified American that the proposed change meant continuous display, and gave American an opportunity to comment. In its analysis of the comments received from the air carriers, the FAA explained that the change required that * * *. (Analysis of Comments, Air Carrier Standard Security Program, Change 38, p. 17, included as Exhibit 2 to FAA's Reply to Prehearing Brief/Motion for Decision.) The FAA further explained that the change *removed* the * * *. (*Id.*) While some commenters, citing safety concerns, urged the FAA not to adopt a continuous display requirement, the FAA pointed out that safety need not be compromised if air carriers * * *. (*Id.*) The FAA explained why display is so important:

* * *

(*Id.* at 17-18; emphasis added.) For all of the reasons cited in the above-quoted paragraph, the FAA concluded that the security program would require the * * *. (*Id.* at 18; emphasis added.) The FAA provided American with a copy of its analysis of the comments. Further, after the * * * language became effective but before the FAA

initiated the instant civil penalty actions, the agency closed administratively hundreds of other cases involving American employees or contractors not displaying their badges at Dallas-Forth Worth International Airport.⁹ (Exhibit 4 to FAA's Reply to Pre-Hearing Brief/Motion for Decision.) Thus, American knew that the term * * * contemplated continuous display.

Under the due process clause of the U.S. Constitution, is the term * * * void for vagueness?

American argues, in the alternative, that the term * * * in the security program violated American's right to due process because it did not provide American with adequate notice that it could be penalized for its employees' failure to display their badges. (Appeal Brief at 10.)

The Administrator may decline to consider certain constitutional challenges – for example, those involving challenges to the rules of practice as a whole. *See, e.g., In the Matter of Continental Airlines*, FAA Order No. 90-12 at 6 (April 25, 1998). The Administrator has stated that the Federal Courts of Appeals constitute a more appropriate forum to resolve such challenges. *Id.* at 6. However, the Administrator has found it necessary and appropriate to consider constitutional claims of vagueness. In the Matter of TWA, FAA Order No. 98-11 at 10 (June 16, 1998); In the Matter of Continental Airlines, FAA Order No. 97-34 n. 8 (October 23, 1997) (citing In the Matter of USAir, FAA Order No. 96-25 (August 13, 1996) and In the Matter of [Airport Operator], FAA Order No. 96-1 (January 4, 1996)); In the Matter of Continental Airlines, FAA Order

⁹ 277 cases, to be exact.

No. 90-12 at 6 n.5 (stating that there may be situations in which it will be necessary to consider certain due process arguments, such as “whether the standard allegedly violated is defined with a sufficient degree of specificity to support the imposition of a punitive sanction”).

A law or regulation may be void for vagueness if it does not define the conduct it prohibits so that an ordinary person would know what is required, or if it encourages arbitrary and discriminatory enforcement. Freedom to Travel Campaign v. Newcomb, 82 F.3d 1431, 1440 n.10 (9th Cir. 1996). Under the vagueness doctrine, a law or regulation that does not fairly inform a person of what is commanded or prohibited is unconstitutional as violative of due process. In the Matter of TWA, FAA Order No. 98-11 at 10 (June 16, 1998), citing In the Matter of [Airport Operator], FAA Order No. 96-1 at 7 (January 4, 1996).

In the instant case, a person of ordinary intelligence would understand that a badge hidden in a pocket or under an outer garment was not * * *. Thus, the challenged portion of the security program is not vague.

Assuming *arguendo* that the security program requirement was potentially vague, potential vagueness may be mitigated by executive interpretation of the challenged provision. Howard v. FAA, 17 F.3d 1213 (March 1, 1994), citing Go Leasing v. NTSB, 800 F.2d 1514, 1525 (9th Cir. 1986). American had the benefit of repeated agency interpretations of the * * * language, thereby mitigating any potential vagueness. As stated above,¹⁰ before the FAA initiated the instant cases, it repeatedly provided American notice that the security program required continuous display. It did so first

¹⁰ See *supra* discussion beginning on page 6.

when the FAA provided American a copy of the proposed change, again when it actually promulgated the change (in its analysis of comments), and finally when it initiated each of the hundreds of Dallas-Fort Worth badge display cases that the agency ultimately closed administratively prior to the instant cases. Thus, American did have fair warning.

Under the due process clause of the U.S. Constitution, did the law judge err by deciding these cases without a hearing?

As for American's argument that the law judge violated its right to due process by deciding these cases without a hearing, it too must be rejected. American argues that it was unable to present evidence of industry practice and that the law judge relieved the FAA of its burden of presenting evidence and proving its case.

The reason for granting motions for decision, like motions for summary judgment, is "to eliminate useless trials on undisputed issues of fact." Flynn v. Sandahl, 58 F.3d 283 (7th Cir. 1995), citing 6 Moore's Federal Practice ¶ 56.04[1] at 56-60 to 56-61 (2d ed. 1994). In such cases, the non-moving party is under an affirmative duty to point out specific facts in the record that create a genuine issue of material fact. Martin v. Daily Express, 878 F. Supp. 91 (N.D. Ohio 1995). Due process does not require an evidentiary hearing where there are no factual issues to resolve. Swift v. Ciccone, 472 F.2d 577 (8th Cir. 1972).

In the instant case, the law judge ordered American to outline, in its prehearing brief, its anticipated factual presentation and any justification for lowering the sanctions, but American failed to comply. Later, when Complainant filed its motion for decision, American again had the opportunity, as well as the obligation, to show that a hearing was

necessary, by filing affidavits or other evidence (including evidence of industry practice if American believed such evidence would support its position), but once again American failed to respond adequately. American filed no affidavits or other evidence with its reply to the motion for decision.

American has never denied that the badges of its employees and contractors were hidden. For example, it states in its appeal brief that “[t]he 23 badge cases pending before [the Administrator] involve circumstances where an American employee wore his identification media ... attached to a work shirt or placed in a pocket [so that] it was covered by an outer garment” Appeal Brief at 3, n.1. Thus, the law judge did not err in finding, pursuant to 14 C.F.R. § 13.218(f)(5), that there was no genuine issue of material fact and that Complainant was entitled to judgment as a matter of law.

Under 14 C.F.R. § 108.5(a), did American fail to carry out its security program for “each operation,” when its employees were inside the security identification display area and their badges were hidden inside pockets or under garments, but Complainant failed to present any evidence or even to allege that they were working on a specific flight?

American’s final argument is that to prove the alleged violations, Complainant must connect each alleged violation to a specific flight, which it failed to do. American bases its argument on the following provision:

(a) Each certificate holder shall adopt and carry out a security program that meets the requirements of § 108.7 for each of the following scheduled or public charter passenger operations:

(1) Each operation with an airplane having a passenger seating configuration of more than 60 seats.”

14 C.F.R. § 108.5(a)(1). According to American, unless Complainant can prove that the air carrier employee or contractor was working on a particular operation -- *i.e.*, flight -- then no violation can be found. As stated above, American claims that many of the employees or contractors at issue were in a baggage room or some other location inside the Security Identification Display Area, but were not working on a particular flight. (Appeal Brief at 16.)

An airline employee's work on a *particular* flight is not an element of a violation of Section 108.5. The badge display requirement applies to all portions of the Security Identification Display Area.¹¹ American does not dispute that the American employees were inside this area, or that American conducts operations subject to Section 108.5(a) at this airport.

For security purposes, all parts of the Security Identification Display Area are important. Baggage rooms especially must be kept free from unauthorized individuals, given the potential for planting of explosives in baggage that later will be loaded onto aircraft. If the employees were working on American's business as a whole -- *i.e.*, multiple flights as opposed to a single flight -- the need for them to display their badges was no less.

¹¹ See *supra* p. 2 for the text of Section VI.B.1, which applies to * * *.

For the foregoing reasons, this decision denies American's appeal¹² and affirms the law judge's orders granting Complainant's motions for decision.¹³ American is hereby assessed civil penalties totaling \$250,500.¹⁴

(Original signed by Jane F. Garvey)

JANE F. GARVEY, ADMINISTRATOR
Federal Aviation Administration

Issued this 22nd day of December, 1998.

¹² American's appeal brief challenges only the findings of violations, and not the sanction amounts.

¹³ Unless Respondent files a petition for review with a Court of Appeals of the United States within 60 days of service of this decision (under 49 U.S.C. § 46110), this decision shall be considered an order assessing civil penalty. *See* 14 C.F.R. §§ 13.16(b)(4) and 13.233(j)(2) (1998).

¹⁴ For the amount assessed in each case, *see supra* note 8.